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March 16, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 15, 2006

Case Number: TSO-0359

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization¹ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." A local DOE Security Office (LSO) suspended the individual's access authorization pursuant to the provisions of Part 710. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

I. Background

The DOE granted the individual a security clearance in February 2002 after she had provided assurances to the DOE that (1) she would neither renew nor use a passport (foreign passport) that had been issued to her by a country on the DOE's list of sensitive countries (the sensitive country),² nor (2) claim dual citizenship with the sensitive country. Within nine months of receiving her DOE security clearance, the individual renewed her foreign passport and then traveled on five occasions to the sensitive country.

After the LSO learned in 2005 that the individual had used her foreign passport several times while holding a DOE security clearance to travel to the sensitive country, it conducted a Personnel Security Interview (PSI) with her in September 2005 (2005 PSI). The LSO could not resolve the security concerns associated with the individual's conduct in the 2005 PSI so it initiated formal administrative review proceedings under 10 C.F.R. Part 710.

As required by the Part 710 regulations, the LSO first informed the individual that her access authorization had been suspended pending the resolution of certain derogatory information that created substantial doubt regarding her continued eligibility to hold a security clearance. In a Notification Letter that it sent to the individual, the LSO described this derogatory information

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

² The sensitive country in question also appears on the United States Department of State's list of nation-states that sponsor terrorism.

and explained how that information fell within the purview of one potentially disqualifying criterion. The lone criterion at issue is set forth in the security regulations at 10 C.F.R. § 710.8, subsection l (Criterion L).³

Upon her receipt of the Notification Letter, the individual exercised her right under the Part 710 regulations and requested an administrative review hearing. On February 17, 2006, the Director of the Office of Hearings and Appeals (OHA) appointed another attorney as the Hearing Officer in this case; I was appointed the substitute Hearing Officer on November 28, 2006 and subsequently conducted an administrative hearing in the case.

At the hearing, three witnesses testified. The LSO called one witness and the individual presented her own testimony and that of one other witness. In addition to the testimonial evidence, the LSO submitted 22 exhibits into the record; the individual tendered 12 exhibits.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

³ Criterion L relates in relevant part to information that a person has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . .” 10 C.F.R. § 710.8(l).

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites one potentially disqualifying criterion as the basis for suspending the individual's security clearance, *i.e.*, Criterion L. As justification for invoking Criterion L in this case, the LSO alleges that the individual, by using her foreign passport to travel to a sensitive country, exercised dual citizenship and demonstrated a preference for a foreign country over the United States. According to the LSO, the individual engaged in this conduct after making representations to the DOE that she would refrain from so doing. To support its contentions in this regard, the LSO points out that during a Personnel Security Interview conducted in January 2002 (January 2002 PSI) the individual told the LSO that she would not renew or use her foreign passport while holding a DOE security clearance. The LSO asserts that it granted the individual a DOE security clearance in February 2002 based, in part, on her assurances that she would neither renew nor use her foreign passport or claim dual citizenship. The LSO asserts that the individual reaffirmed these same assurances during a second PSI in May 2002 (May 2002). The LSO adds that the individual also signed a DOE Security Acknowledgement in August 2004 certifying that she understood that violating any commitment or promise upon which the DOE previously relied to favorably resolve an issue of access authorization eligibility would have a negative impact on her security clearance. The LSO then asserts that despite the individual's oral representations during the January 2002 and May 2002 PSIs and her signing of the DOE Security Acknowledgement in August 2004, the individual renewed her foreign passport and used it to travel to the sensitive country on five occasions for personal reasons: from December 2002 to January 2003, from December 2003 to January 2004, in August 2004, from December 2004 to January 2005, and from June 2005 to August 2005. Finally, the LSO notes that during the 2005 PSI the individual acknowledged that: (1) she understood that she should not have renewed or used her foreign passport while holding a DOE security clearance, and (2) she still possessed her foreign passport.

I find that the LSO properly relied on Criterion L in suspending the individual's security clearance. I find further that the individual's conduct as outlined above raises several security concerns. First, as the Personnel Security Specialist who testified at the hearing explained, the use of a foreign passport indicates a preference for a foreign country over the United States. Transcript of Hearing (Tr.) at 80. When a person acts in such a way to indicate a preference for a foreign country, the person may be prone to provide information or make decisions that are harmful to the interests of the United States. *See* Guideline C, paragraph 9 of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House. Moreover, as the Personnel Security Specialist pointed out at the hearing "a person's exercise of a preference for a foreign country calls into question that a person's loyalty to the

United States and can leave the person vulnerable to blackmail, pressure or coercion.” Tr. at 80. Furthermore, the individual provided assurances to the DOE that she would not renew or use her foreign passport but she later reneged on those assurances. Her willingness to disregard some rules raises a concern that she might disregard the rules regarding the proper protection of classified information and thereby calls into question her reliability and trustworthiness.

IV. Findings of Fact

The individual was born in the sensitive country at issue and lived there for many years. Ex. 6. In 1996, the individual married a United States citizen who had traveled to the sensitive country, and she immigrated to the United States the following year. *Id.* In August 2000, the individual became a naturalized United States citizen and she divorced her husband three months later. *Id.* The individual’s mother, her only sister and her niece still live in the sensitive country. *Id.* at 121, 153.

Sometime in 2001, a DOE contractor hired the individual for a position that required her to obtain a DOE security clearance. Ex. 9. As part of the security clearance process, the LSO learned that the individual possessed a valid foreign passport and so it conducted the January 2002 PSI to explore this issue. Ex. 21. During the January 2002 PSI, the LSO advised the individual that she would need to relinquish her foreign passport in order to hold a DOE security clearance and the LSO discussed several ways in which the individual could accomplish this objective.⁴ *Id.* at 12-19. The individual was asked at the January 2002 PSI if she understood that she was not allowed to use her foreign passport and she responded affirmatively. *Id.* at 24. The individual then told the LSO that once her foreign passport expired⁵ that she could not get a new one because she would have to tell the sensitive country that she was a United States citizen. *Id.* at 13. The personnel security specialist provided the individual with her business card and told her to contact her if she needed any information relating to the foreign passport issue. *Id.* at 16.

The DOE granted the individual a security clearance in February 2002. Sometime in the fall of 2002, the individual’s sister called the individual and advised her that she needed to travel to the sensitive country because her mother’s health was failing. Tr. at 125. In October 2002, the individual purchased airline tickets for travel to the sensitive country beginning in December 2002. Ex. 11. In November 2002, the individual applied for an extension of her foreign passport through the embassy of another sensitive country (Sensitive Country #2) that has foreign relations with the sensitive country in question. Ex. 17. Sensitive Country #2 extended the individual’s foreign passport for five years until November 29, 2007. Ex. 16.

The individual completed a form entitled, “Notification of Unofficial Foreign Travel to a Sensitive Country” in which she advised her employer that she would be traveling to the

⁴ Typically, the LSO asks that foreign passports be returned to the local embassy or consulate for the country in question and obtain a receipt showing proof to that effect. In this case, however, that approach was not possible because the sensitive country had no diplomatic or consular relations with the United States. Therefore, at the conclusion of the January 2002 PSI, the personnel security specialist agreed to hold the individual’s foreign passport until it expired. *Id.* at 19. When the personnel security specialist learned that the LSO was not allowed to hold original passports, she returned the passport to the individual. *Id.* at 22.

⁵ The individual’s foreign passport was slated to expire on November 29, 2002.

sensitive country from December 15, 2002 until January 18, 2003. Ex. 12.⁶ The individual traveled as planned and used her foreign passport to enter and exit the sensitive country. Ex. 20 at 56. The individual subsequently traveled four more times to the sensitive country while holding a DOE security clearance, each time using her foreign passport to enter and exit the sensitive country. The dates of the individual's travel were the following: from December 20, 2003 to January 17, 2004 (Ex. 15), in August 2004 (Ex. 17), from December 25, 2004 to January 9, 2005 (Ex. 14), and from June 19, 2005 to August 20, 2005 (Ex. 13).⁷ The record reflects that the individual notified her employer in writing of her foreign travel to a sensitive country for three of these four trips.⁸

In August 2004, the individual completed a Questionnaire for National Security Positions (QNSP) in which she revealed that she had traveled to the sensitive country at issue on two occasions since she had received her DOE security clearance. During her 2005 PSI, the LSO asked the individual if she recalled being told by the LSO that she was not permitted to use her foreign passport. The individual responded as follows: "Maybe they did . . . I don't know, I don't remember the exact words . . . I understood it all and I know it's hard to have two passports, but in my situation because my mom was not feeling good at all I, I really decided to do that . . . I think there is [sic] always exceptions in any laws or rules or any policies . . . I have no other choices." Ex. 20 at 82.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).⁹ After due deliberation, I have determined that the individual's access authorization should not be restored. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

⁶ The signature and date are illegible on Exhibit 12.

⁷ The individual also traveled to the sensitive country in May 2006 while her security clearance was in a suspended state. Ex. C and D. The issue before me is only with the individual's travel to a sensitive country while holding a DOE security clearance after providing assurances that she would not do so.

⁸ The record does not contain a "Notification of Unofficial Foreign Travel to a Sensitive Country" for the trip that the individual took in August 2004.

⁹ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

A. The Individual's Testimony and Documentary Evidence

The individual testified that her mother suffers from Alzheimer's disease and that her mother's prognosis is unknown. Tr. at 118, 153. She related that in late 2002, her sister called and asked that she return to the sensitive country because her mother's health was rapidly deteriorating. *Id.* at 118. She explained that she tried to bring her mother to the United States but was unable to do so because of "bureaucratic issues with [the sensitive country]." *Id.* at 118. She introduced into evidence photographs of her mother which showed a marked physical deterioration in her mother's demeanor over the last few years. Exhibits H, I and J.

The individual maintained at the hearing that she was truthful in May 2002 when she told the LSO that she would not travel to the sensitive country. Tr. at 128. She explained that she violated her promise to the DOE because her mother became ill and her mother could not travel to the United States. Ex. 20 at 94. She also related that it was hard for her to choose between her commitment to the DOE and her ill mother but in the end she chose her mother. *Id.* at 93. She explained, "as a daughter [I] think it is my responsibility to go and visit my mom." *Id.* at 142. At the hearing, she claimed that one of her co-workers told her that he had traveled to the same sensitive country while holding a security clearance. *Id.* at 125. She decided that she would do as the co-worker had and use her foreign passport to travel to the sensitive country. *Id.* at 130. When queried why she did not go to the personnel security specialist instead of a co-worker for advice on this matter, the individual responded that she could not remember the personnel security specialist's name.¹⁰ *Id.* at 136. She further testified that she did not believe that she was hiding anything from the DOE because she had briefings and debriefings by her employer prior to and upon her return from the sensitive country. *Id.* at 126-127. She also testified that she had no other option but to use her foreign passport to go to the sensitive country because of the lack of diplomatic relations between the United States and the sensitive country at issue. *Id.* at 142. The individual claimed at the hearing that she was naïve regarding her travels to the sensitive country and deeply regrets her actions. At the hearing, I asked her what she will do if her security clearance is restored and her mother becomes extremely ill. *Id.* at 132. She first stated that she would contact someone at the DOE to determine whether she could go to the sensitive country. *Id.* When her attorney asked what she will do if the DOE refused her permission to go to the sensitive country, she responded that she would not do anything illegal so she might quit her job. *Id.*

Regarding the issue of possible blackmail, coercion or duress, the individual admitted that the United States State Department's website states that it cannot provide protection or routine consular services to United States citizens traveling to the sensitive country in question. *Id.* at 142. When asked whether she feels "at risk" traveling in the sensitive country, the individual responded, "I feel a risk always, but because I look like [the persons in the sensitive country], I speak the language . . . and enter the country with a foreign passport. . . they have no idea that I'm a US citizen." *Id.*

¹⁰ She did not mention at the hearing that the personnel security specialist had provided her with a business card and offered to answer any questions that she might have regarding the foreign passport matter.

B. A Former Supervisor's Testimony

The individual's supervisor from a former employer testified that she has known the individual since 1999. *Id.* at 184. She opined that the individual is extremely bright and very dependable. *Id.* at 188. She added that the individual has a lot to offer "as far as intellectual property." *Id.* at 185. She related that the individual was responsible for very valuable equipment at her last place of employment and that "no equipment under her control went missing." *Id.* at 188. She testified that the individual cried when she became a United States citizen and told the former supervisor that her United States citizenship was "a dream come true." *Id.* at 186.

C. Hearing Officer Evaluation of Evidence

After listening to the individual's testimony and observing her demeanor, I believe that the individual is a devoted daughter who cares deeply about her ailing mother. Based on the record, I find that the individual disregarded her assurances to the LSO that she would not renew or use her foreign passport to travel to the sensitive country because of her sense of duty and love for her mother. While the individual's familial loyalty is admirable and even laudable, it nonetheless proves troubling from a security standpoint.¹¹

The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. In this case, the DOE granted the individual a security clearance based, in part, on her representations that she would not renew or use her foreign passport to travel to the sensitive country. It was only nine months after receiving her security clearance that the individual elected to break her promise to the DOE by renewing her passport through a conduit, *i.e.* Sensitive Country #2, and traveling to the sensitive country using that newly renewed foreign passport.

In evaluating the individual's conduct, I rejected her contention that her actions should be excused because she relied on a co-worker's statements that he had used a foreign passport to travel to the same sensitive country while holding a DOE security clearance. Even if it is true that her co-worker or others may have traveled to the sensitive country while holding security clearances,¹² I cannot ignore the facts of this case: that the DOE specifically told the individual that she could not use her foreign passport to travel to the sensitive country, that she agreed twice to refrain from this conduct and that she deliberately chose to ignore the assurances that she had given to the DOE. Furthermore, it was my impression from the evidence at hand that the individual would have traveled to the sensitive country even if one of her co-workers had not shared information about his personal situation with her. In this regard, I considered the individual's statements to the LSO during the 2005 PSI that she believes that there are always exceptions to every rule or policy. This point of view reflects a problematic mindset and reaffirms my impression that the individual decided that her personal circumstances warranted a

¹¹ In addition to the Criterion L security concerns, the LSO could have invoked 10 C.F.R. § 710.8(e) in this case. The individual's allegiance to family members who reside in a sensitive country with ties to terrorism heightens her risk for foreign exploitation, inducement, manipulation, pressure or coercion.

¹² I am not in a position to evaluate the propriety of other clearance holders' actions or to determine whether there were any unique circumstances that allowed other clearance holders to travel to the sensitive country. I am only permitted to look at the unique facts of this case.

deviation from the DOE requirement that she relinquish her foreign passport. Unfortunately, the individual presented no evidence at the hearing to convince me that she can be trusted in the future to comply with all DOE rules, regulations and policies. In fact, I believe that as long as the individual's mother resides in the sensitive country, it is likely that the individual will travel again to the sensitive country using her foreign passport. It is noteworthy that the individual has not offered to destroy her foreign passport or refrain from traveling to the sensitive country in the future as a way to mitigate the security concerns at issue here.

Regarding the issue of blackmail, coercion and duress, I find that the individual's choice to travel to the sensitive country and use her foreign passport is very risky for national security purposes. It is not clear to me whether the individual is naïve or in denial that the sensitive country does not know, or could not easily ascertain, her employment history, her United States citizenship, the potential value of her "intellectual property," and her potential access to classified information.¹³ Moreover, when asked at the hearing what she would do if she were detained in the sensitive country and told that she would be sent to jail unless she returned to the United States and obtained classified information for the sensitive country, she responded that she would immediately notify the appropriate authorities about the matter. Tr. at 147. When questioned further about the ramifications of her action on her mother, the individual responded, "She's an old lady. They are not going to do anything to her." *Id.* When I inquired about her sister's fate, the individual responded, "My sister is the only concern, but I don't know, I always hope for the best, that nothing [sic] such things happen to me."¹⁴ *Id.* at 147. In the end, I find from a common sense standpoint that the risk of blackmail, coercion and duress in this case is palpable.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to mitigate the security concerns advanced by the LSO. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: March 16, 2007

¹³ In this regard, I found it interesting that a former employer highlighted the individual's "intellectual property" as one of her chief assets.

¹⁴ The individual revealed that her sister is trying to immigrate to Canada so it is possible that her sister's safety might not be an issue if she moves to Canada. *Id.* at 121. The individual still does have a niece, who is expecting a baby, and her mother, residing in the sensitive country, however.